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CURRENT TOPICS.

THE right of a railroad companies to eject passengers from their cars because of non-observance of their rules and regulations, was passed upon in the case of *Huertel v. New York, etc., R. Co.*, decided in the State of New York on the 12th inst. The plaintiff having a commutation ticket on the defendants' road, entered the depot and took his seat in the cars for the purpose of proceeding on his journey. The company's regulations required that passengers entering the depot should pass through a certain door. Before the train started some of defendants' employees removed him from the car and put him out of the depot on the ground that he had entered it by the wrong door. The plaintiff brought suit for the ejection, and obtained a verdict, which was affirmed on appeal. The court said: "Notwithstanding the fact that the plaintiff was where he had a legal right to be at the time the defendants' employees removed him, they contend that because in getting there he had violated a rule of the company by passing in at the wrong door, they had authority not only to prevent a violation of the rule in the first instance, but the right to punish afterwards those who succeeded in violating it by a sort of constabulary pursuit, even into the cars in which they have in the meantime become seated, and to the extent of bringing back the offender, *nolens volens*, and putting him out of the same door in which he, through mistake or indiscretion, entered, to the end that he may make a more mannerly entrance according to the company's regulations. This is altogether too tyrannical, circumlocutory and impracticable for business men seeking their homes after the day's toil, to humor or permit. While railroad companies may command obedience to such of their reasonable and orderly regulations as they have the power to enforce, they have no authority to punish by force past transgressions of such rules as they claim the plaintiff violated. * * * If a person, in an attempt to reach his own premises, trespasses upon mine, I have the undoubted right to stop him and compel him to turn back; but if he succeeds in crossing my line it must be clear that I have no right to pursue him upon his own premises and bring him back, *nolens volens*, so that he may make the entrance he ought to have made in the first instance through his own premises instead of mine. The right of pursuit ends when the person pursued reaches the place where he lawfully belongs, and if I break in upon his lawful rights at that place I become a trespasser and am answerable for whatever wrong I may commit. The right of pursuit, if it existed at all in the present case, ceased when the plaintiff got on the car, because he was lawfully there. What was done after that by the company's employees was unlawful."

The liability of a city for the negligent acts of its officers was considered in the recent Pennsylvania case of *Freeman v. Philadelphia*, 7 W. N., 45. The plaintiff, while driving his horse attached to a wagon on a street in that city, was run into and seriously injured by the rapid and careless driving of one of the engines of the fire department, while in charge of one of the members or officers of said department. In an action to recover for the injury, it was held that the city was not liable. "In exercising or performing acts for its corporate benefit," said the court, "it (the city) is liable, like an individual, for the action of its agents or servants; but, in performing acts discretionary on its part, or for the purposes of government, and for the general public good, without benefit to it in its corporate capacity, it is not liable for the acts of its appointees or officers. The municipal corporation is but the representative of the State or of the public, and the officers or individuals employed are not the employees of the corporation, but are public officers, exercising acts for the common good. Municipal corporations, to the extent that they are authorized or directed to exercise public governmental powers and perform public governmental duties solely for the general good, are governmental agencies, and entitled to immunity in respect to the acts of their subordinate officers or agents. They are auxiliaries of the government. Public duties are, in general, those which are exercised by the State or a part of its sovereignty

for the benefit of the whole public, and the discharge of which is delegated or imposed by the State upon the municipal corporation. They are not exercised by the State or the corporation for its own emolument or benefit, but for the protection of the entire population. Private or corporate powers are those which the city is authorized to execute for its own emolument, and from which it derives special advantage, or for the increased comfort of its citizens, or for the well ordering and convenient regulation of particular classes of the business of its inhabitants, but are not exercised in the discharge of those general and recognized duties which are undertaken by the government for the universal benefit. * * * The extinguishment of fires in a city is not a corporate duty, but is an act exercised in pursuance of the sovereign power conferred for the benefit and protection of all the inhabitants, and relieves them from a common burden and danger. It is not for the immediate benefit of the corporation, as such, nor is its expense assessed upon owners of buildings alone, or any special class of persons whose property is pecuniarily benefited or protected thereby, and it makes no difference whether the legislature prescribed the duties of the officers or delegated the powers to the city to do so. * * * To maintain this action would be opening the way to make the city liable for the wrongful act of every public officer, a proposition never contemplated in the creation of the municipal corporation. Whilst it may be a hardship upon the plaintiff to be thus injured, the public good requires that he should look to the individual who occasioned the injury, and not to the corporation within whose bounds it happened."

The cases cited by the court sustain the principle above stated. In Elliott v. City of Philadelphia, 7 Phil. 128, 75 Pa. St. 347, it was held that the defendant was not responsible for the negligence or misfeasance of a police officer in not taking proper care of the property of a person lawfully arrested. In Grant v. City of Erie, 19 Pa. St. 423, which was an action against the city to recover damages for allowing certain reservoirs, intended to supply water for extinguishing fires, to fall into decay, by reason whereof plaintiff's houses were destroyed by fire, it was held that as it was discretionary with the city to construct the reservoirs, it was not liable. In Hafford v. City of New Bedford, 16 Gray, 297, where the city was authorized to establish a fire department, and the plaintiff was run over and injured by a hose carriage driven carelessly along the highway, Bigelow, C. J., said: "Where a municipal corporation elects or appoints an officer, in obedience to an act of the legislature, to perform a public service in which the city or town has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants or of the community, such officer cannot be regarded as a servant or agent, for whose negligence or want of skill in the performance of his duties a town or city may be held liable. The members of the fire department of New Bedford, when acting in the discharge of their duties, are not servants or agents in the employment of the city, for whose conduct the city can be held liable; but they act rather as officers of the city, charged with the performance of a certain public duty or service, and no action will lie against the city for their negligence or improper conduct when acting in the discharge of their official duty." See, also, Fisher v. City of Boston, 104 Mass. 87; Tainter v. City of Boston, 6 Cent. L. J. 408. In O'Meara v. City of New York, 1 Daly, 425, which was an action to recover for injuries done plaintiff while standing on the sidewalk, where he was knocked down and run over by a fire engine whilst in charge of firemen, Brady, J., said, speaking of the fire department: "Its members owe their allegiance to the city, not as members of the corporation, but as members of an organization identified with the administration of the city government, and forming a part of its protective police." In Hayes v. City of Oshkosh, 33 Wis. 314, where the plaintiff's house was set on fire by sparks from a fire engine, it was held that the city was not liable. See, also, Torbush v. City of Norwich, 38 Conn. 225; Walcott v. City of Swampscott, 1 Allen, 101; Barney v. City of Lowell, 98 Mass. 570; City of Chicago v. Turner, 80 Ill. 419; City of Chicago v. McGraw, 75 Ill. 566; Jewett v. City of New Haven, 38 Conn. 373; Howard v. City of San Francisco, 51 Cal. 52.

SUGGESTIONS UPON CODE REVISIONS AND CODE PROCEDURE.

In these days of code-reforms and code-revisions, suggestions upon the general subject of code procedure, and the hindrances to its progress towards greater perfection, may not be out of place. To those who have carefully read such books as those of Mr. Pomeroy and Judge Bliss, little advantage will accrue, perhaps, from merely casual comment, or general suggestive examinations of the subject. But to the lawyer whose engagements prevent him from reading volumes of books, such inquiries may be more or less interesting.

It is proposed to devote this article to the consideration of some of the causes of the slow progress of code-reform.

1. All reformers are radical, and law reformers have been no exception, and too often have had little appreciation of the magnitude of their undertakings. The result has been that, while code-reforms have usually been radical and sweeping, there has been much crudeness in the legislation by which they have been initiated, and hence reforms in procedure, which have been brought about without a code of procedure, as in Massachusetts and some of the other States, have been, apparently, quite as beneficial, and have produced far less friction and confusion than has been produced by codification in the States where codes have been adopted.

2. The unfriendly spirit of the profession, both upon the bench and at the bar, has retarded the progress of reform no little. It is a matter of history that while the whole spirit of code-reforms was to introduce the liberal, just and simple rules of the equity practice, in the terser and more concise forms and methods of the common law, yet through the radical disregard of this spirit in the codifiers, in many instances it is very blindly and imperfectly indicated by the code provisions in large classes of cases. Then, add to this the unfriendliness of the bench, and almost the whole weight of talent and learning of the profession—it is almost wonderful that so much progress has been made. This unfriendliness was but natural. To ask men who had, at the expense of half a lifetime, acquired proficiency in a profession the most difficult, to discard their former learning, and adopt a new system which to them seemed crude and impracticable, was a proposition, not only startling, but naturally repulsive. For although, as we shall see as we proceed, there was much of unfounded prejudice in this unfriendliness, yet, the strongest of almost all the older members of the profession in the States where code reform was introduced, at the time of its introduction were arrayed against it. And it is a remark which probably finds few if any exceptions, that few men, skilled in the common law and chancery practice, who reach middle life before the introduction of code procedure, ever become expert in the latter, or lose their partiality for the former. This unfriendliness leads the *veterans* of the bar, upon the introduction of code procedure, to adopt no more of its requirements, nor conform to any more of its rules, than become absolutely necessary; holding on to all the technical niceties, and all the superfluous and redundant verbiage possible to be called into the procedure, under the new system. This spirit was more or less countenanced by the judges in many of the States, where their contempt for the new system was often ill-disguised.

It is easy to say that these prejudices are unfounded in the light of experiment, but *before* these experiments, there seemed great plausibility in the objections, especially to the minds of the staid. And this plausibility was increased by the class of men who were too frequently put forward to introduce reforms of this character— men who obtained place for faithfulness to their party rather than for their fitness for their positions. But whether well or ill founded, these prejudices did largely exist, and have had a great influence in retarding progress in code precedure.

3. Another great hindrance to progress has been want of proper precedents. The common law and equity precedents, still in use where they are not superseded, contain the perfection which results from the wisdom, learning and experience of ages. But with a single section of an act of the legislature called a code of civil procedure, these fair fabrics builded by the architects of the ages, fashioned by the skill and wisdom of the sages of the law, and looked upon by the very Nestors of the profession as approximating perfection itself, are dashed to pieces. And what have we in their stead? A few crude, ill-framed, unlawyer-like forms, which, com-

pared with the former precedents, are as the rudest log-cabin compared with the grandest palace.

The skilled and experienced practitioner may frame his forms in code precedure by conforming the forms of the common law and equity, respectively, to the purposes of his practice. But nothing short of skill and experience can accomplish this. Indeed it is only the few who can conduct procedure under any system without forms adapted to the particular case in hand. Whether the procedure be civil or criminal, common law, equity, or admiralty, or whether it be even the simpler procedure in bankruptcy, insolvency, or probate, nothing is so essential to uniformity, accuracy and certainty as proper forms.

In code procedure the want of proper forms has been greatly felt. This is the more so for the reason that so peculiar are the provisions of the codes of the several States, that if forms are so framed as to be sufficient in one State, some special provision in the code of another State will possibly render them insufficient, and so if a lawyer in Indiana or Kentucky would use Estee's or Abbot's forms he must be sufficiently skilled in the requirements of the law of his own State to know whether the form is sufficient, and then he will need no forms.

4. Another hindrance to the progress toward the perfection of code procedure, is the great diversity of special provisions in the different codes of the several States called code States. This diversity makes such a want of uniformity in the practice reports, that those of one State are of little value except in the particular State in which the reported decisions are made. Indeed there is no subject upon which there seems to be so little comity among the courts of the several States as that of procedure, and much of the light which might be available upon this subject is discarded by the courts of the respective States. The tendency of such works as those of Mr. Pomeroy and Judge Bliss for good in this respect cannot be over-estimated.

5. The progress of code procedure has been greatly retarded by the firmness with which the judges of the Supreme Court have withstood its encroachments upon the common law and equity forms and distinctions. While a majority of them are residents of the so-called code States, the judges have till recently steadily maintained the old forms and distinctions intact; and when Congress has at last compelled the adoption of the rules of pleadings and practice adopted in the States respectively, except as to equity cases, still the court seems to give a very conservative construction to the act of Congress, and some of the judges, both on the circuit and in *banc*, seem to regard it as an encroachment upon their prerogative.

6. But perhaps that which has been the greatest drawback to the progress of code procedure to a resonably perfect system, is the peculiarities of the structure of code provisions, and the adoption of code phraseology. It is a fact worthy of note, that while code framing, compiling or revising should command the very highest skill in the profession, and while it does generally now command the best skill, it has not always been so. In the earlier history of the code procedure reforms, as we have seen, the best talent of the profession was as a rule violently hostile to the reform, and the pioneer codifiers were usually selected by the legislatures as *politicians* and *enterprising radical reformers*, and not because of their high legal attainments or fitness for the position from a lawyer's stand-point. The truth is that first class lawyers, as a rule, are found rather among the conservative ranks than among reformers. Whether this be a compliment to them or otherwise, the fact remains the same. In the selection of code revising commissioners, better methods for their appointment have been adopted, and the prejudices of the bar against code procedure having mainly disappeared, and it having become a fixed fact, the best men of the profession are now usually selected, and this will add greatly to the value of modern code revisions. But this is a digression.

To return to code phraseology, it may be said, though the utterance be but a truism, that so imperfect is human language, that the very highest skill in writing with the profoundest knowledge of the subject discussed, and the most careful selection of language will sometimes fail of a clear and accurate expression of the idea intended. But perhaps, in most cases, all these qualifications have not concurred in the framers of our modern codes of procedure.

Prominent among the faults in code phra-

seology is, its narrow and restrictive character. This fault is often, perhaps, as much attributable to the idea or conception upon which provisions are framed, as the language by which the same is expressed. An illustration from each of these classes of faults shall close this article.

Take the case of parties. The pioneer code State by its code provided, in accordance with the equity rule of parties, that the *real party in interest*, should be plaintiff. But to prevent inconvenience the framers of that code conceived the idea, and very properly, that among other exceptions the holder of the legal title to property, or choses in action not equitably assigned, though held for the use of another, ought to be able to sue for the enforcement of any right or the redress of any wrong concerning them without joining anyone having an equitable interest therein. This idea was well conceived, was equitable, convenient and practicable. But the codifiers were too *narrow* and technical in their selection of language to express this exception, for such it was; they used the terms "trustee of an express trust." Such an expression in such a connection led to vexatious litigation before a construction was reached, and then received a construction which rendered an amendment necessary. This amendment extended the definition, by construction, to embrace "one with whom a contract is made for the benefit of another." Instead of a new formulation, most of the other code States have copied this amended section of the *pioneer code*, and the construction of the section, as amended and adopted, is still in litigation. This may suffice for an instance of a well-conceived provision with an ill-conceived phraseology for its expression.

An illustration of a too narrowly conceived provision literally carried out is found in one of the code rules of pleading. Before the codes, both at law and in equity where a written instrument was the foundation of an action or defense, it might be set out *in hæc verba*, or pleaded according to its terms. Or in equity, after a reference for identification, it might be filed as an exhibit, and thus become a part of the pleading. But under some of the codes by express provision, the instrument must be copied *into* the pleading, or the original, or a copy must be filed with the same. And, of course, proper reference must also be made to it in the pleading. But witness the result of this *peremptory* and narrow requirement. An inexperienced pleader prepares his pleading (where the suit is on a note by the assignee against the maker); he describes the note by its terms, and refers to and files the original note with its indorsement, showing title. But his case is reversed in the court of last resort, for want of an averment of the indorsement. Wherefore? Because the indorsement is not the "*foundation of the action.*" Again, the assignee sues the indorser upon his indorsement. The pleader describes the note sufficiently for identification, files a copy of the same, and avers the indorsement in proper form, with the steps necessary to fix the liability of the indorser. But upon appeal he finds himself reversed again; and wherefore? Because in this case the indorsement "*is* the foundation of the action," and *it* was not copied into the pleading, nor was *it* nor a *copy* of *it* filed with the complaint. So a pleader of the old school thinks such provisions directory, and writes his pleading accordingly, setting out the instrument by its terms. But his case is reversed because the provision is *peremptory*.

The codes in such case should provide, simply, that the pleader may either set out his instrument *in hæc verba*, by its terms, or exhibit it or a copy in his pleadings, and that any pleading upon such an instrument which so identifies it as to render a judgment upon it a bar to another action will be sufficient. Then these absurd technicalities which serve no beneficial purposes would be wholly obviated.

Having in this paper pointed out some of the hindrances to progress towards perfection in code procedure, if we shall continue our suggestions we will try to make some which we think may lead to progress in this behalf.

ASA IGLEHART.

In *Maxwell v. Goelschins*, 11 Vroom, 383, the Supreme Court of New Jersey held, after an able and elaborate consideration of the question, that the State Legislature can not legalize any judicial act which is void for want of jurisdiction, and that, therefore, an act purporting to validate a sale made in partition proceedings by commissioners in a court, having no jurisdiction either over the property or the owners, was nugatory, and such sale void. The same rule was held in a similar case in Richard v. Roe, 68 Penn. St. 248.

CONTRIBUTORY NEGLIGENCE.

O'DONNELL v. MISSOURI PACIFIC R. CO.

St. Louis Court of Appeals, May, 1879.

1. CONTRIBUTORY NEGLIGENCE — WALKING ON RAILROAD TRACK.—Plaintiff, a man in full possession of his faculties, was injured by a locomotive of defendant, whilst walking between the rails of defendant's track, in broad daylight, with nothing to obstruct the view along defendant's track for a quarter of a mile in the direction in which the locomotive was coming: *Held*, that this was negligence on plaintiff's part directly contributing to the injury and precluding a recovery.

2. UNDER THE CIRCUMSTANCES STATED, the testimony of plaintiff that he looked carefully for the engine at the proper time and did not see it, is no evidence from which the jury can draw a reasonable inference of proper care on his part.

Appeal from the St. Louis Circuit Court.

HAYDEN, J., delivered the opinion of the court:

The demurrer to the evidence should have been sustained, as the plaintiff's testimony showed that his own negligence directly contributed to the injury. He was upon the track when struck by the tender of the locomotive which was backing eastward toward the Union Depot in St. Louis, to get a train, and not upon any highway or street crossing the track. The plaintiff had been for about four years accustomed to walk upon or between the railroad tracks, at and near where the accident happened, in going to and coming from his work. About eight o'clock of the morning in question, the day being clear, he went upon the track at Tayon avenue to go eastward, looked westward to see if any engine was approaching, and, after walking between the rails for a short distance, again looked back, and seeing nothing coming, continued to walk upon the track between the two rails as before. This track was one of the middle tracks; and along it came the tender which, pushed by the locomotive, struck the plaintiff, injuring him, but not so severely that he could not get up and walk away. The plaintiff testifies that no whistle was blown or bell rung, and that he did not hear any noise of tender or engine as they approached him. The defendant's evidence tended to prove that there were men upon watch on the locomotive; that the bell was ringing all the time; that the plaintiff was seen by those on watch, or some of them; that when the tender approached him, he was not upon but near the track, and that, as the engine slowly backed down, he attempted to cross directly in front of the tender, and so was injured.

In cases like the present, we start with the primary fact that the plaintiff was negligent. He was where he had no right to be, and was not the less violating the law, because he was accustomed to violate it every day, and was not prevented by the defendant. It is true that if the evidence shows that this negligence of the plaintiff, though clearly, as it is, a condition without which the injury could not have existed, is by other facts more immediately surrounding the injury, so far removed as to be only a remote condition, it is then, like other remote conditions, disregarded by the law. This is the foundation of the rule that where the defendant can by the exercise of ordinary care discover the danger and avoid the result, the fact that the plaintiff is negligent does not excuse the defendant. This implies that the physics of the case are such that the law can pronounce that the efficient or legal cause of the injury is in the negligence of the defendant. But this can never be the fact, and accordingly the court is bound to take the case from the jury, where, up to the very moment of the injury, the negligence of the plaintiff mingles, as an efficient and equally operating cause, with the negligence of the defendant. To say otherwise is to say that a plaintiff may recover for an injury directly caused by his own negligence.

In the case at bar, allowing that the defendant was negligent, yet it is clear from the plaintiff's testimony that his negligence was an effective and operating cause up to the very moment of the injury. He was a not a child, but a man in the full possession of his senses. He was not caught upon the track for a moment, nor was he there through causes beyond his control. He chose to walk, not at the side, but between the rails. He knew that cars were constantly passing; knew even the peculiarities of engines and particular tracks in respect to noise made; knew, as he says, that "the rails are so close together and so smooth that the engines can slip upon you before you know it." Knowing all this, it is clear he did not take precautions adequate to the great danger he had put himself in, and that his failure to do so was a direct cause of the injury. He neither saw nor heard the tender or engine. Though no bell was rung and the locomotive was going fast, as he says, yet the inference is irresistible that he would have either seen or heard the tender, and could have stepped aside in time, if he had either looked or listened, as he should have done. He says he looked at Tayon avenue, and again when about half way between there and where he was injured. But the view westward was open for at least a quarter of a mile, and the physical fact remains that the engine and tender backed down and could, if the plaintiff's evidence is true, have been seen as they were backing. The precise point where the plaintiff looked and how carefully he looked are open to question; but a verdict based upon his testimony that he looked in proper time, and yet did not see the tender or engine, would be unsupported by evidence. It is not a mere formal statement of a witness to fill up a gap in a case that can sustain a verdict. There must be substantial evidence, and the inferences drawn by the jury must be reasonable. Nolan v. Shickle, 3 Mo. App. 300. Here the fact that the plaintiff testified that he looked, had no tendency to prove that the physical object could not have been seen by him in time to have stepped aside, if, under the circumstances as detailed by himself, he had used proper caution. His whole testimony must be taken together.

The present is not within the class of cases re-

lied upon by the plaintiff, of which the cases of Frick v. St. Louis, etc., R. Co. (No. 803 this court) and Isabel v. Hannibal, etc., R. Co., 60 Mo. 475. 2 Cent. L. J. 590, are examples. What is said above distinguishes these cases from this. In the first case the defendant, through the failure to exercise ordinary care, failed to see the child upon the track, when, if such care had been exercised, the child might have been seen and the injury avoided. In the Isabel case the object was seen upon the track. and there was evidence tending to prove that by the exercise of ordinary care the engineer and fireman might have discovered that it was a child and have stopped the train in time to save its life. These two cases come under the general rule laid down in Harlan v. St. Louis, etc., R, Co., 65 Mo. 25, 6 Cent. L. J. 229, The present case belongs to the class of which Michigan, etc., R. Co., 34 Mich. 468, is an example. Here, as there, it is impossible for a court to say that the recklessness of the plaintiff does not mingle with that of the defendant as a direct and efficient cause. The evidence to remove the plaintiff's negligence and make it a remote condition, as in the two cases above cited it was removed, does not here exist. The petition did not charge nor did the testimony show the facts necessary to sustain the instruction given as to negligence remotely contributory on the plaintiff's part, and prevention of the injury by the exercise of ordinary care on that of the defendant. Those on the engine did discover the plaintiff but there is no evidence tending to show that they discovered him on the track. The discovery was of a man off the track, and for a man off the track there was no occasion to stop the engine. The plaintiff was seen on the track only just before the tender struck him. Again, the plaintiff cannot recover on grounds inconsistent with the substantial facts of his own case. He cannot have the engine running fast to show that he could not avoid it, and slow to show that it could have stopped. Here, widely as the testimony of the plaintiff differed from that of the defendant, one point in common was the tendency to prove that the plaintiff's negligence was a direct and efficient cause of the injury.

The judgment is reversed and the case dismissed. All the judges concur.

JUDGMENT OBTAINED BY FRAUD — ACTION TO SET ASIDE.

FLOWER v. LLOYD.

English Court of Appeal, January, 1879.

That an action to set aside a judgment on the ground that it was obtained by perjury or fraud is not maintainable, *semble*.

Appeal from Bacon, V. C.

The action was brought for a declaration that the judgment in a former action between the same parties had been obtained by fraud, and for consequential relief. In the former action, the plaintiffs obtained an injunction and damages for the infringement of a patent for improved methods of printing and decorating metal plates. On appeal, however, the action was dismissed with costs. During the proceedings in the court of appeal, an inspection of the defendants' process was ordered and made.

The plaintiffs afterwards alleged that the defendants had wilfully misled the inspector, and applied to the court of appeal for a re-hearing, which was refused: See Flower v. Lloyd, 25 W. R. 17, L. R. 6 Ch. D. 297. The plaintiffs then brought this action, and the vice chancellor considered the fraud proved, and stayed the judgment in the former action with costs against the defendants. The defendants appealed.

Sir H. M. Jackson, Q. C., Marriott, Q. C., Seeley, and *De Castro*, for the appellants.

Kay, Q. C., Aston, Q. C., and *Macrory*, for the respondents. When fraud on the court is proved, the court will set aside a decree, and remit the parties to their rights: Richmond v. Tayleur, 1 P. Wms. 734; Kennedy v. Daly, 1 Sch. & Lef. 355; Brooke v. Lord Mostyn, L. R. 4 H. L. 304.

Both sides discussed the evidence at great length. The appeal was heard on November 22, 23, 25, 26, 29, 30, and December 2, 3.

Cur. adv. vult.

January 11—The written judgment of the court was delivered by

BAGGALLAY, L. J., who, after a minute examination of the evidence, stated at length the reasons which led the court to come to the conclusion that the charges made had not been substantiated, and said that the court reversed the judgment of the vice-chancellor, and gave judgment for defendants with the usual consequences as to costs.

JAMES, L.J.

I have to add some observations which have been seen by the Lord Justice Thesiger, and in which he concurs. We have thought it right and due to the defendants to go through the allegations made against them; and their counsel, in fact, scarcely asked for any judgment, except one based on their acquittal of the fraud charged against them. But we must not forget that there is a very grave general question of far more importance than the question between the parties to these suits. Assuming all the alleged falsehood and fraud to have been substantiated, is such a suit as the present sustainable? That question would require very grave consideration indeed before it is answered in the affirmative. Where is litigation to end if a judgment obtained in an action fought out adversely between two litigants, *sui juris* and at arm's length, could be set aside by a fresh action on the ground that perjury had been committed in the first action, or that false answers had been given to interrogatories, or a misleading production of documents, or of a machine, or of a process had been given? There are hundreds of actions tried every year in which the evidence is irreconcilably conflicting, and must be on one side or other willfully and corruptly perjured. In this case, if the plaintiffs had sustained on this ap-

peal the judgment in their favor, the present defendants in their turn might bring a fresh action to set that judgment aside on the ground of perjury of the principal witness and subornation of perjury; and so the parties might go on alternately *ad infinitum*. There is no distinction in principle between the old common law action and the old chancery suit, and the court ought to pause long before it establishes a precedent which would or might make in numberless cases judgments supposed to be final only the commencement of a new series of actions. Perjuries, falsehoods, frauds, when detected must be punished, and punished severely; but in their desire to prevent parties litigant from obtaining any benefit from such foul means, the court must not forget the evils which may arise from opening such new sources of litigation, amongst such evils not the least being that it would be certain to multiply indefinitely the mass of those very perjuries, falsehoods and frauds.

BAGGALLAY, L. J.:

With reference to the observations which have just been made by the Lord Justice, I only wish to state that, whilst I am fully sensible of the evils and inconveniences which must arise from reopening what are apparently final judgments between litigant parties, I desire to reserve for myself an opportunity of fully considering the question how, having regard to general principles and authority, it will be proper to deal with cases, if and when any such shall arise, in which it shall be clearly proved that a judgment has been obtained by the fraud of one of the parties, which judgment but for such fraud would have been in favor of the other party. I should much regret to feel myself compelled to hold that the court had no power to deprive the successful but fraudulent party of the advantages to be derived from what he had so obtained by fraud.

ADMINISTRATOR DE BONIS NON — PRIVITY BETWEEN ADMINISTRATORS — REVIEW.

TAYLOR v SEWALL.

Supreme Court of Maine, February, 1879.

An administrator *de bonis non* can not maintain a petition to review a judgment recovered against his predecessor for any cause. He is neither a party to such judgment nor in privity with one who is. The remedies given to an administrator *de bonis non*, in Rev. Stats., ch. 87, § § 45, 46, do not include that of review.

On exceptions from Sagadahoe county.

Petition by an administrator *de bonis non* for review of a judgment against the administrator, on account of alleged collusion.

The respondent moved to dismiss the petition because the court had no authority to grant a review between the parties named. The presiding justice granted the motion, and the respondent alleged exceptions.

Webb & Haskell with *C. W. Larrabee*, for the respondent; *F. Adams*, for petitioner.

DANFORTH, J., delivered the opinion of the court:

This is a petition by an administrator, asking a review of a judgment obtained, as he alleges, through fraud and collusion against his predecessor. In Elwell v. Sylvester, 27 Me. 536, it was held that a review can be granted only upon the petition of a party to the judgment, or some one representing his interest. In this case the petitioner is neither; certainly not a party. Nor does he represent the interests of the party, but may be in a position antagonistic. True, he is the successor of a former administrator, but derives no right to the property to be administered upon from or through him, but takes it directly from the decedent. He is "appointed to administer upon that portion of the estate of a deceased person not before administered upon." 2 Redfield on Wills, 89. He may even maintain an action against his predecessor, as his title dates from the death of the testator or intestate. Id. 91. There can, therefore, be no privity between them, nor can the one in any sense be said to represent the other. Nowell v. Nowell, 2 Me. 75-80; Grout v. Chamberlin, 4 Mass. 611; Freeman on Judgments, § 163.

This principle of the common law seems to be conceded in the argument; but it is contended that it has been changed by the provisions found in R. S. ch. 87, §§ 45 and 6. If this statute is to have the effect claimed for it; if by it the administrator *de bonis non* is as regards the judgment made a privy with his predecessor, the result must be, that on the principal cause alleged for a review, that of collusion, the petition must fail. The party himself could hardly take advantage of his own wrong, and his privies would be equally bound with him. But such is not the effect of the statute. The remedies there provided after judgment obtained are *scire facias*, an action of debt and a writ of error. Neither of these changes the title to the property involved. The administrator *de bonis non* still claims under the decedent, takes his title and not that of his own predecessor. In neither of these remedies can the original judgment or execution issued thereon, be satisfied by a levy upon the property in the hands of the new administrator. It can only be the foundation for a new process, under which, for the reason that the present petitioner is not a party or privy, he may set up the alleged fraud and collusion as a defense. If judgment is obtained under a proceeding in debt, or *scire facias*, then to such the new administrator becomes a party, but only when the original judgment becomes merged in the new one.

It is true that under a writ of error the original judgment is not merged in a new one, but is either affirmed or reversed. If affirmed it stands as before, and if unsatisfied the same remedies are open to the plaintiff; if reversed he must resort to such legal remedies as are prescribed for recovering his original claim.

Thus while under these remedies supplied by the the statute the administrator *de bonis non* may be brought into privity with the claim established by the original judgment, yet it is not with the judgment itself, but another in which that is merged after due process of law.

It is a very significant fact as bearing upon this question, that in the enumeration of remedies provided for the administrator *de bonis non*, that of a petition for, or a writ of review, is not mentioned. As the statute is in derogation of the common law, and cannot be extended beyond the meaning derived from a fair construction of its terms, this would seem to be conclusive. This appears to be in accordance with the principle established in Paine v. McIntire, 32 Me. 131. When that decision was made the statute provided for all the remedies now authorized except that of debt, and it was there held that debt would not lie, although the result would be substantially the same in *scire facias* and debt; yet as the latter was not specifically mentioned, the remedy must be under the former only. Much less can we by construction extend the statute so as to cover by review a remedy so entirely different in its procedure and results from any authorized by its terms.

Exceptions sustained.

NOTE,—The reporter has also sent with this case a useful letter from the late Chief Justice Ether Shepley to Judge Peters, both at the bar at its date, December 28, 1858, with a postscript showing the then estimated value of legal services.

MR. PETERS:

Yours of the 25th is before me. The case in 4 Mass. 611, is founded on the case of Gaites v. Gough, Yel. 33 and Cro. Jac. 3, which decided that the admr. *de bonis non* could not maintain *sci. fa.* to have benefit of a judgt. recovered by the first personal rep. of the estate, because not a party to the record and not a privy to it. Hence, the necessity for the decision of Turner v. Davies, 2 Saund. 149, that the deft. in such judgt. might sue out a writ of *audita querela* and have that judgment declared void. And an admr. *de bonis non* must commence a new suit for the same cause of action. But the parties to the judgment thus declared void were legal parties representing legally the rights of the party living and of the party deceased in the subject matter of the contest. And so it was decided that they were when the judgment was against and not in favor of the ex. or ad. who had deceased: Snape v. Norgate, Cro. Car. 167, and in such case the judgment might be enforced against an admr. *de bonis non*. To remedy the difficulty occasioned by the case of Gaites v. Gough, the statute of 17 Char. 2, c. 8 was passed. The case in 4 Mass. truly represents the common law, in its actual state, and this is admitted in Dale v. Roosevelt, 8 Cow. 333, where the decision is different, because the statute of Char. has been reenacted in N. Y. While in the case of Dikes v. Woodhouse, 3 Rand. 287, the court of Virginia appear to have repudiated the case of Gaites v. Gough as absurd, and hold that judgments recovered by and against an ex. or admr. deceased are alike valid. This case I have not been able to see in the book in which it is reported, and state it from digests and from what is said of it in the case of Stacy v. Thrasher, 6 Howard, U. S. 44, in which the opinion adverts to the inconsistency of the decisions respecting the effect of a judgment recovered by and agst. an ex. or ad. who has deceased.

Under this condition of decisions our court probably might not decide in accordance with the court in Virginia. But it is not necessary that it should do so to allow an ad. *de bonis* to prosecute a suit commenced by an admr. who ceases to rep. the estate. The suit is one in behalf of the intestate. If the first admr. had deceased, that suit would survive by the provisions of statute, c. 87, § 8; and if they survive there is a necessary implication that they must be prosecuted by the person legally entitled to represent and control the subject-matter in contest, and that person can only be an admr. *de bonis*. Our courts can not decide that a judgment recovered by an admr. whose powers cease by revocation or removal, is void, for the statute, c. 64, § 54, makes all his legal acts valid, and these provisions, taken in connexion with those of § 16, exhibit the intention that when an admr. is permitted to resign, his legal acts should remain valid, because otherwise it would be "detrimental to the estate" which it is not to be. Although the case of a resignation of an admr. and an appointment of one *de bonis non* does not come within the letter of c. 82, § 30, yet when considered in connexion c. 87 § 8, preserving actions, and with the provisions of c. 64, § 16, it seems to me to come within the mishaps designed to be provided for and remedied by it.

I find in 2 Shep. Dig. U. S. p. 813, art. 529, case of Elliott v. Eslava, 3 Ala. 514, to which book I have no access here, that decision is said to be that the resignation of an admr. does not abate a pending suit, and that it may be prosecuted in the name of his successor; that the same doctrine is stated in Skinner v. Frieson, 8 Ala. 915, 7 U. S. Dig. p. 571, art. 223, and same in case of State v. Murray, 3 Eng. (Ark.) 199: 9 U. S. Dig. 242, art. 247. Whether in these cases there was any statute provision, I have here no means of ascertaining

In my opinion such should be the decision in this State, especially as the action being com'd by intestate survivors. Most respectfully,

ETHER SHEPLEY.

December 28, 1858.

P. S.—This has cost labor enough for $10, but if the amount pending in your case is small, or other circumstances render it more fitting, send me $5.

REMOVAL OF CAUSES.

WEBBER v. HUMPHREYS.

United States Circuit Court, Eastern District of Missouri, April, 1879.

A motion, under the Missouri statute as to corporations, for execution against a stockholder can not be removed to the Federal court. It is not a "suit at law, or in equity," within the meaning of these words, as used in the statutes giving the right of removal o causes from State to Federal courts.

Mr. Wieting for the motion; *Mr. Shepley, contra.*

DILLON, Circuit Judge (orally):

This is a motion by Webber to remand the case to the State court. Strictly, perhaps, it should have been in the form of a motion to dismiss. It appears upon the record filed in this case that Webber, sometime since, recovered a judgment against this corporation, known as the Illinois & St. Louis Bridge Company, for a considerable sum of money. It also appears that an execution has been issued on that judgment and returned

nulla bona. That judgment was recovered in the circuit court of the State, for the city of St. Louis, and the execution on the judgment issued out of that court. When the execution was returned, the plaintiff in the judgment made a motion for execution against, among others, Solon Humphreys, alleging that he was the holder of a large number of shares of the stock of this corporation, and that those shares had not been fully paid. That motion was based upon this clause of the statute of the State of Missouri (1 Wag. St. 291, sec. 13) occurring in the chapter on Corporations: "If any execution once issued against the property and effects of a corporation, and there cannot be found whereon to levy such execution, then such execution may be issued against any of the stockholders to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon." The double liability having been abolished in 1870, the present attempt is to compel Mr. Humphreys to pay the amount alleged to be due on his stock, as a debtor of this corporation. Substantially, when we arrive at the essence of this proceeding, the idea is this, that Mr. Humphreys, as the holder of unpaid stock, is a debtor to the corporation, and creditors of the corporation have a right to subject that debt to the payment of their claims. This provision that execution may issue against the stockholder of an insolvent corporation on the return of *nulla bona* is accompanied by the proviso, viz.: "Provided, always, that no execution shall issue against any stockholder except upon an order of the court in which the action, suit or other proceedings shall have been brought or instituted, made upon motion in open court, after sufficient notice in writing to the persons sought to be charged; and upon such motion, such court may order execution to issue accordingly." When proceedings of the character above named have been had, an execution issues against the stockholder to enforce his liability to pay. Such a motion was made in the circuit court of the State in which this judgment was rendered, and notice was given to Mr. Humphreys that an application would be made for an execution against him under this statute. He filed an application to remove the case as made by this *motion* to this court, alleging everything that was necessary to entitle him to a removal, so far as citizenship and so far as value are concerned.

But the question is whether a motion of this kind may be removed. Of course, that question depends on a true construction of the acts of Congress in that regard. From the earliest legislation on this subject down to the present time, the nature of the cases that may be removed have been described substantially in the same language. In the 12th section of the original Judiciary Act, in the act of 1866, in the act of 1867 known as the Local Prejudice Act, and in the broad and comprehensive act of 1875; also, in the Revised Statutes where the earliest enactments are embodied, the language is as to value: "Any suit wherein the amount in dispute exceeds the sum or value of $500;" and in the act of 1875, sec. 2, descriptive of the cases which may be removed, it is stated that, "any suit of a civil nature at law or in equity in which the amount in dispute exceeds the sum of $500," may under certain prescribed conditions be removed.

The suit must be one of a civil nature at law or in equity. This is a proceeding against Mr. Humphreys to compel him under this statute of Missouri to pay for his stock. If it is a civil "suit at law or in equity," he is entitled to have it removed; if not he is not thus entitled.

In the case of West v. Aurora, 6 Wall. 139. Chief Justice Chase said: "A suit removable from a State court must be a suit regularly commenced by a citizen of the State in which the suit is brought, by process served upon the defendant who is a citizen of another State; and who if he does not elect to remove is bound to submit to the jurisdiction of the State court." This undoubtedly expresses the general rule. There are several other cases reported which have some bearing on the present case, and the substance of them in this regard is substantially this: that it is the main suit or controversy between the parties that is removable, and not a mere sequence or dependency of a suit. In the decisions of the Supreme Court of the United States there is a case, to this effect namely: Where in an ordinary proceeding in a State court one party sues another, and, by attachment or otherwise, seizes property, and a third person claims it as his property (he may claim it sometimes by intervention and sometimes by summary modes provided for a trial of the rights of property), it was decided that the party intervening in this way in the main case and setting up a right of property could not remove such an ancillary or dependent matter, for such a proceeding was not a suit which could be removed under the acts of Congress. That is the nearest approach to the decision of this question, which I recall as having been made by the Supreme Court of the United States. On the circuit there is reported a decision —Chapman v. Barger, 4 Dill. 557, arising under the statutes of Iowa, as to the rights of an "occupying claimant." It has the approval of all the judges of that circuit court, including Mr. Justice Miller. That case in substance was this: The Iowa statute provides that where, in an action of ejectment, the plaintiff recovers a judgment for the property against the person holding the property in good faith and under color of title, and the unsuccessful defendant has made improvements, no execution shall issue to put him in possession if the defendant in a given time files a petition in the case asking to be allowed the value of his improvements. Such a judgment was rendered in a State court against a party, and in due time he filed a petition,—the unsuccessful defendant in the ejectment suit—for an allowance of his improvements, and the plaintiff in the ejectment thereupon applied to remove the case to the Federal court, and the question was whether the contest between him and the defendant in respect to the value of the improvements was cognizable on that removal by the Federal court. We held that the petition of the occupying claimant could not be removed. In that case the court say: "We hold that the peti-

tion of the occupying claimant cannot be removed, as under the Iowa statute and decisions of the Supreme Court of the State it is essentially part of, and ancillary to, the main suit. The main suit is at an end and a judgment has been rendered thereon in the State court. That judgment must remain in the State court. It cannot be brought here. The petition of the occupying claimant,—whose rights are wholly statutory—is a dependency of the main suit and cannot be separately removed. Under the legislation of Iowa in respect of occupying claimants, as construed by the State Supreme Court, and in view of the relief to which each party is entitled, it is apparent that the rights of the parties must be adjudicated in one and the same court." An apparent exception to this principle is presented in the case of Patterson v. Boom Co., 3 Dill. 465. It was decided in that case that a suit in the State court between a land owner and incorporated company under a right of eminent domain where the question to be tried was the value of the land, was a suit of such a nature as could be removed to the Federal court, although the proceeding in its inception was an appraisement by commissioners appointed under the charter of the company. The legislation in Minnesota, under which that case arose, is peculiar. It provides that when a condemnation is had, if the owner is dissatisfied he may take an appeal from the sheriff's jury, or whatever the local inquisition is, to the court of the State; and provides further as to how it shall be conducted: that one party shall be the plaintiff and the other the defendant, and that the only question to be tried shall be the damages. It was decided that, under those circumstances the case was removable, and within the past few weeks the Supreme Court of the United States has affirmed that decision.

The Supreme Court of New Hampshire, 55 N. H. 351, has decided a point somewhat analogous; to the effect that a garnishee or trustee holding credits, etc., joined as defendant for that purpose, is not within the removal acts, and cannot transfer the case as to himself, but only as between the principal parties in the suit.

The statute of Missouri on the subject of corporations in providing a remedy for creditors, makes a provision in this 13th section, that if the corporation becomes insolvent and a judgment is recovered against it in the courts of the State, and an execution is returned *nulla bona*, any creditor of that corporation may have execution against any stockholder in the corporation, to make out of that stockholder the balance which he may owe on his stock. That is one of the remedies which the statute of Missouri provides in respect to the liabilities of the stockholders and the rights of creditors of corporations.

In this case the creditor obtained his judgment against the corporation in the State court, and that court issued an execution thereon. This is simply a proceeding to enforce these provisions of the statutes of Missouri in regard to the liabilities of stockholders. This is to our mind not an independent suit. It is a mere sequence, dependency or supplemental proceeding based on the State statutes as a means of enforcing the judgment of the State court. It is our opinion, therefore, that this proceeding cannot be removed into this court. As well might it be attempted to remove proceedings under an execution upon a judgment in the State court. The State court refused to enter an order for removal, and the stockholder filed a transcript of the case so far as to bring before us this question.

The proper entry to make is simply to dismiss the case.

TREAT, J., concurs.

INFANCY — MONEY PAID BY INFANT ON REPUDIATED CONTRACT—ACTION.

SHURTLEFF v. MILLARD.

Supreme Court of Rhode Island, February, 1879.

1. THE CONDITIONS OF AN AUCTION SALE required $180 to be paid at the time of sale by a purchaser. S, a minor, bid off the property, paid $40 of the required $180, made a default in paying the balance, and repudiated the contract of purchase. The property was again advertised and sold. Whereupon S, still a minor, brought assumpsit for the $40 paid by him. *Held*, that he was entitled to recover. *Held*, further, that the defendant was not entitled to deduct from the $40 sued for, the expenses imposed on him by the plaintiff's act.

2. MONEY VOLUNTARILY PAID by a minor under a contract from which he has derived no benefit may be recovered back.

3. WHEN A MINOR SUES for the value of work done under a contract which he has repudiated, he may recover on *quantum meruit* the value of his services less the estimated injury to the defendant arising from the broken contract, *semble*.

Exceptions to the Court of Common Pleas.

Assumpsit by plaintiff, a minor, sued by his next friend in the Justice Court of the City of Providence against the defendant to recover "the sum of forty dollars paid by the plaintiff, a minor, to the defendant and wrongfully withheld by the defendant." It was carried to the court of common pleas by the defendant's appeal and brought to this court by the defendant's exceptions. It appears from the record that Millard sold certain realty at auction under the powers of a mortgage deed made to him, the conditions of the auction sale requiring ten per cent. of the purchase money to be paid at the sale. Shurtleff, at the auction sale, purchased the property for $1,800, paid $40 at once and promised to pay the remaining $140 of the ten per cent. required before nightfall. Shurtleff neglected to pay this sum and refused to complete the purchase contract, alleging that he misunderstood the price. Millard then advertised and sold the property again. Shurtleff was a minor during all these proceedings and when his action was brought. The presiding judge in the court of common pleas directed a verdict for the plaintiff and the defendant excepted

POTTER, J., delivered the opinion of the court: The plaintiff, a minor, sues to recover back the sum of forty dollars which he paid the defendant as the percentage required to be paid down for property struck off to him at an auction sale. The defendant contends, *first*, that it having been a voluntary payment the plaintiff cannot recover it back; *second*, that if he is entitled to recover it back the defendant should be allowed to deduct for the expense and trouble which he has been put to by the plaintiff's rescinding the contract. Parsons, Contracts, vol. 1, cap. 17, sect. 5, *322, 6th edition, 1873, lays down the law on the first point broadly as claimed by the defendant. "If an infant advances money on a voidable contract which he afterwards rescinds, he cannot recover this money back because it is lost to him by his own act, and the privilege of infancy does not extend so far as to restore this money unless it was obtained from him by fraud." He cites no authority. The doctrine so broadly laid down has been overruled by later authorities and this passage has been condemned in Robinson v. Weeks, 56 Me. 102, 104; still the last edition of that text-book takes no notice of the fact.

In one of the earliest cases, Earl of Buckinghamshire v. Drury, 2 Eden, 60, 72, Lord Mansfield did use language similar to this; but the case was on the point whether a *feme covert* could be barred of her dower by jointure settled on her while under age. Lords Hardwicke and Mansfield and Sir John Wilmot concurred in the decision of that case, but it has been disapproved since. See in relation to that case, Wilmot's Notes of Opinions, 177, 226; Milner v. Lord Harewood, 18 Ves. Jr. 259, 271.

In Zouch *e dimiss.*, Abbot v. Parsons, A. D. 1765, 3 Burr. 1794, compare 1 Evans Decisions, 111, Lord Mansfield laid down many of the general rules drawn from the decisions, which have since substantially prevailed, and also, it is believed, first used the expression that the privileges of infancy were given as a shield and not as a sword, which has become a maxim in this branch of the law.

Macpherson, in his work on Infancy, page 484, also cited in Medbury v. Watrous, 7 Hill N. Y. 110, 114, lays down as law that if a minor contracts for an estate and pays a deposit he cannot, in the absence of fraud, recover it back. But he cites no case. But on page 489, the case of Wilson v. Kearse, Peake's Add. Cas. 196, at Nisi Prius, is cited where Lord Kenyon is reported to have once used language similar to that we have quoted from Parsons, that if a minor pays money voluntarily he cannot, if there is no fraud, recover it back. But there is no full nor reliable report of this case. The case of Holmes v. Blogg, 8 Taunt. 508, also in 2 J. B. Moore, 552, was this: The infant had paid a premium for a lease and had occupied the leased premises until he came of age, when he quit the premises and sued to recover the money back. The court held that having paid money on a valuable consideration and having partially enjoyed that consideration he could not recover it back. Chief Justice Gibbs does indeed say that "having paid the money with his own hand" he "cannot recover it back again." In Corpe v. Overton, 10 Bing. 252, the court holding that the plaintiff might recover back money paid, expressly say that they do not impeach the decision in Holmes v. Blogg. In Corpe v. Overton, Corpe agreed to form a partnership and paid down £150 to be forfeited if he failed on coming of age to execute a proper partnership agreement. He rescinded the contract and sued for the money back, having received no advantage whatever from the agreement. In deciding this case, Bosanquet, J., said that the court used strong expressions in Holmes v. Blogg, but we must look not to the expressions alone but to the facts to which they were applied. And see also as to the language used by Gibbs, C. J., in Holmes v. Blogg, Riley v. Mallory, 33 Conn. 201, 207, and Robinson v. Weeks, 56 Me. 102, as to the true ground of decision in that case.

The case of M'Coy v. Huffman, 8 Cow. 84, A. D. 1827, was a case where an infant had agreed to purchase land and had paid in money and work toward it and sued to recover for that. The court decided on the authority of Holmes v. Blogg, that he could not recover. In Medbury v. Watrous, 7 Hill, N. Y. 110, A. D. 1845, the plaintiff, a minor, agreed to buy a house and land of the defendant and had in part payment done work while a minor for the defendant to the value of $70.20. He never had possession of nor received anything from the house, but on coming of age sued to recover the value of his work. The case of M'Coy v. Huffman was relied on for the defendant, but the court overruled it. And they distinguish it from the case of Holmes v. Blogg, and approve of Corpe v. Overton, and hold that the plaintiff should recover. The case is very ably stated. It was decided when the Supreme Court of New York was the Supreme Court of the whole State and was composed of Nelson, Beardsley and Bronson. Robinson v Weeks, 56 Me. 102, was a suit to recover back money paid by plaintiff while a minor for a share of stock in a land and petroleum company. The share had never been transferred to him. He renounced the contract within a fortnight after coming of age. He did not return the receipts for the money, but offered to assign over to the defendant all his interest in the company. The case was tried before the full court. The court held that the plaintiff could not recover without returning the consideration if it was in existence or under his control, but that the receipts were of no value except as evidences of payment. "The protection which the law supposes the infant to need is just as much required against the improvidence which has paid out as against that which only promises to pay, and where it can be given without converting the shield into a sword, it should be given." Judgment for the plaintiff.

The weight of authority and we think of reason is, that it is no defense that the minor voluntarily paid the money, and that when he has received no benefit from the contract he has a right to recover it back. Excellent remarks on the classification of minors' contracts are contained in Reeve's Domestic Relations, quoted and approved in Riley v. Mallory, 33 Conn. 201; also in

Robinson v. Weeks, 56 Me. 102, 106. See, also, Price v. Furman, 27 Vt. 268.

But it has been argued that if the plaintiff can recover, there should be a deduction made for any expenses which the defendant has been put to.

In Moses v. Stevens, 2 Pick. 332, the plaintiff, a boy of eighteen years, agreed to work for the defendant for three years, and the defendant was to clothe him, etc., and at the end of the time was to pay him $120. He worked three months, and left without cause of complaint; the defendant subsequently paid the plaintiff $2, which he took in satisfaction. The plaintiff sued for his work on a *quantum meruit*. The judge charged that he was entitled to what his services were worth to the defendant, and that the defendant was not entitled to deduct any damages for breach of the contract before the plaintiff's coming of age, but that if the defendant was injured by the sudden termination of it without notice, the jury might deduct the amount of the injury. On arguing the exceptions it was contended that the contract, being for the infant's benefit, was binding, and that the doctrine of entirety of contract applied to infants as well as adults. The court held the charge correct, that the jury should give what, *under all the circumstances*, the services were worth, making allowance for any injury, and that that was the reasonable and lawful course.

It is claimed that the case of Moses v. Stevens was overruled in Massachusetts by the case of Vent v. Osgood, 19 Pick. 572. In the last case, the plaintiff, a minor, shipped as a seaman for a voyage, and deserted before the end of the voyage, without fault on the part of the master, and sued for his wages. The plaintiff claimed on *quantum meruit* for his services. The defendant contended that the effect of the minor's avoidance of the contract was prospective only, and that as he had not performed it he could not recover for past services, and Weeks v. Leighton, 5 N. H. 343, was cited as authority for applying the doctrine of entirety of contract to a minor as well as to an adult. These were the facts and the points made, and no claim was made for a deduction for damages as was made in Moses v. Stevens. The points presented to the court were essentially different. So far from its being overruled in Massachusetts, the doctrine of Moses v. Stevens is recognized in Gaffney v. Hayden, 110 Mass. 137, and in Breed v. Judd, 1 Gray 455, Thomas, J., in delivering the opinion of the court, says that the only question in the case was the question of the entirety of the contract; and that if a case like Vent v. Osgood should again arise, "the grounds on which its decision is based might need reconsideration." See, also, as to this case of Vent v. Osgood, remarks in Medbury v. Watrous, 7 Hill, N.Y. 110, 115.

In the case of Judkins v. Walker, 17 Me. 18, the court lay down the rule to be in cases of suits for services, to allow for the benefit conferred beyond any injury occasioned, just as if there had been no special contract. "This secures to each what may be proved to be equitable and fair under all the circumstances." In the case of Thomas v. Dike, 11 Vt. 273, the court, by Williams, C. J., say that they are inclined to adopt the rule of Moses v. Stevens, and that in a community where so much work and labor is done by persons under age, it would be unsafe if it was not adopted, and in Hoxie v. Lincoln, 25 Vt. 206, the court, by Redfield, C. J., in their opinion quote and approve the rule recognized in Thomas v. Dike, that the minor is to recover for services "what they are reasonably worth, taking into consideration the injury to the other party."

Of the New Hampshire cases cited, Weeks v. Leighton, 5 N. H. 343, seems to have been decided on the ground, formerly so generally applied, of entirety of contract and precedent condition. It was there held the minor could not recover if he left the defendant's services before the expiration of the time. In Britton v. Turner, 6 N. H. 481, the court decided against applying this doctrine even in case of an adult, thus impliedly overruling the case of Weeks v. Leighton, and allowed the plaintiff to recover on a *quantum meruit*. And in Lufkin v. Mayall, 25 N. H. 82, the court expressly overrule Weeks v. Leighton, and hold that as under Britton v. Turner, an adult is allowed to recover on a *quantum meruit*, after allowing a fair indemnity, it is still more just to apply the rule to the case of a minor plaintiff. The rule thus laid down amounts to no more than this, that he is to recover the reasonable worth of his services to the defendant, which would necessarily include a consideration of any injury done, and as so stated it is reasonable and well supported by the authorities.

On the other side, against allowing any deduction, are Whitmarsh v. Hall, 3 Denio 375, and Derocher v. Continental Mills, 58 Me. 217. In the latter case, the plaintiff had agreed to work in a mill for at least six months and not to leave without giving two weeks' notice. She worked a part of the time and left without notice. The court say the question is whether she is liable to have the damage occasioned by not giving the notice deducted. "To compel the minor to make good the loss occasioned by non-performance of his contract is virtually to enforce the contract." No suit could be maintained against the infant for a breach of it, they say, and to allow a deduction for damages seems to be equivalent to that. And they held that the true rule was that of Robinson v. Weeks, 56 Me. 102.

On this we remark that no case has held that damages must be deducted for not giving any notice specially contracted for or not working out the whole time of the contract. But it is a very different thing to hold that there being no binding contract, the plaintiff may recover a reasonable compensation, deducting for any injury done. And the rule of Robinson v. Weeks was laid down in a case of money paid out, and not of services performed.

While we think, therefore, that in cases of work and labor done, the weight of authority is in favor of the rule as stated by Redfield, J., in Hoxie v. Lincoln, 25 Vt. 206, there is no such reason for deduction in the case before us.

The present suit is to recover money paid. If the minor had received any consideration or benefit whatever it would come within another class of cases. But he has received neither. And we think the principles on which Robinson v. Weeks, 58 Me. 102, and Medbury v. Watrous, 7 Hill N. Y. 110, were decided apply to it.

The motion for a new trial must therefore be denied.

DIGEST OF DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

October Term, 1878.

COLLECTION OF PAST DUE TAXES — BOND.—1. Where taxes long past due to the United States are paid to the collector of internal revenue, he and his sureties are liable on his bond for the amount so paid, though it had not then been returned to the assessor's office or passed upon by him, nor the return handed to the collector by the tax-payer sworn to. 2. The case of the Dollar Savings Bank v. United States, 19 Wall. 227, decides explicitly that the obligation to pay the tax on dividends or interest does not depend on an assessment by any officer, and a suit for such tax can be sustained without it. That case governs the present. The tax so paid is public money covered by the terms of the bond. *King v. United States.* In error to the Circuit Court of the United States for the Northern District of Ohio. Opinion by Mr. Justice MILLER. Judgment reversed in part and affirmed in part.

MUNICIPAL BONDS — CONDITIONAL SUBSCRIPTION — WRONGFUL ISSUE OF, BY TOWN OFFICERS. — A town voted to subscribe for stock in a railroad company and to issue bonds therefor. The notices of the election expressly stated that no bond should be issued or delivered to the company or draw interest until the road was completed, and the subscription was in terms made subject to the condition so set forth in the notice. Notwithstanding the said condition bonds were issued by the town officers before the road was completed, and thereupon the company abandoned the road. In an action on interest coupons of said bonds, by one claiming to have purchased before maturity, for value and without notice, the plea was interposed that by reason of the above-mentioned condition the town officer had no authority to issue the bonds; that they were obtained upon the false and fraudulent representations of the company that they intended to complete the road, and that they were not obligatory on the town. *Held*, that said facts did not constitute a defense. The court said: "It is not averred in that plea that the insurance company had, at the time it purchased the coupons in suit, any knowledge or actual notice of the special conditions embodied in the election notice and repeated in the formal subscription of May 23, 1870. Nor is it therein alleged that the bonds, to which these coupons were originally attached, contained recitals indicating that the subscription had been voted and made upon any conditions whatever. The defendant in error was undoubtedly bound to take notice of the provisions of the statute under which the bonds were issued. But it was under no legal obligation to inquire as to the precise form or terms of the subscription, whether it was absolute or only conditional. * * The plea shows that 'the town and the citizens' (to adopt the language of the plea) were assured by the agents and representatives of the railroad company, that the latter intended, in good faith, to perform the special conditions annexed to the subscription, and that all rumors to the contrary were without just foundation. These assurances were credited, and, in reliance upon them, the supervisor and clerk executed and delivered the bonds, knowing at the time that the conditions imposed by popular vote, as well as by the terms of the subscription, had not been complied with. Thus was faith in the promises of a railroad company substituted for a contract which, had the town stood upon it, would either have secured the construction of the road as contemplated, or guarded its people against a burden which has been imposed upon them through the fraudulent conduct of railroad officials, and the violation by its own officers of the trust committed to them. By the acts of the town's constituted authorities, who, by the statute, had the right, under certain circumstances, to execute and deliver the bonds and coupons. the railroad company was enabled to put them upon the money market in advance of the construction of the road. It is now too late for the town to claim exemption, as against *bona fide* purchasers, upon the ground that the railroad company disregarded its promise to construct the road, or upon the ground that its own officers delivered the bonds in violation of special conditions, of which the purchasers had no knowledge or notice either from the statute or otherwise. The remedy of the city is against the railroad company, and its own unfaithful officers, who, it is alleged, were in fraudulent combination with the company." *Town of Brooklyn v. Ætna Life Ins. Co.* In error to the Circuit Court for the Northern District of Illinois. Opinion by Mr. Justice HARLAN. 19 Alb. L. J. 361.

EVIDENCE — OFFICIAL RECORDS — WHEN ADMISSIBLE.— The records of a person employed by the United States Signal Service are admissible in evidence, in the absence of a statute authorizing their admission. "It may be admitted there is no statute expressly authorizing the admission of such a record, as proof of the fact stated in it, but many records are properly admitted without the aid of any statute. The inquiry to be made is what is the character of the instrument? The record admitted in this case was not a private entry or memorandum. It had been kept by a person whose public duty it was to record truly the facts stated in it. Sections 221 and 222 of the Revised Statutes require meteorological observations to be taken at the military stations in the interior of the continent and at other points in the States and Territories, for giving notice of the approach and force of storms. The Secretary of War is also required to provide, in the system of observations and reports in charge of the chief signal officer of the army, for such stations, reports, and signals as may be found necessary for the benefit of agriculture and commercial interests. Under these acts a system has been established, and records are kept at the stations designated, of which Chicago is one. Extreme accuracy in all such observations and in recording them is demanded by the rules of the signal service, and it is indispensable, in order that they may answer the purposes for which they are required. They are, as we have seen, of a public character, kept for public purposes, and so immediately before the eyes of the community that inaccuracies if they should exist, could hardly escape exposure. They come, therefore, within the rule which admits in evidence official registers or records kept by persons in public office in which they are required, either by statute or by the nature of their office, to write down particular transactions occurring in the course of their public duties, or under their personal observation. Taylor on Evidence, § 1429; 1 Greenleaf's Ev., § 483. To entitle them to admission it is not necessary that a statute requires them to be kept. It is sufficient that they are kept in the discharge of a public duty. 1 Greenl. § 496. Nor need they be kept by a public officer himself, if the entries are made under his direction by a person author-

ized by him. Gault v. Galway, 4 Pet. 342. It is hardly necessary to refer to judicial decisions illustrating the rule. They are numerous. A few may be mentioned: Drannond v. Nesmith, 32 Mich. 231; Gurney v. House, 9 Gray, 404; Catherine Maria, 1 Adm. & Eccl. 53; Clicquot Champagne, 3 Wall. 114. We think, therefore, there was no error in admitting the records kept by the person employed for the purpose by the United States Signal Service." *Village of Evanston v. Gunn.* In error to the Circuit Court of the United States for the Northern District of Illinois. Opinion by Mr. Justice STRONG. Judgment affirmed.

SOME RECENT FOREIGN DECISIONS.

RAILROAD—SEASON-TICKET—DEPOSIT—PENALTY—REASONABLE CONDITION.—*Cooper v. London, etc. R. Co.* English High Court, Ex. Div. 27 W. R. 474. The plaintiff, on the purchase of a season-ticket to travel on the defendants' line, paid over and above the charge for the ticket, a deposit of 10s. One of the conditions signed by the plaintiff was that if the ticket was not re-delivered the day after expiry the deposit should be forfeited. The plaintiff did not re-deliver the ticket the day after expiry, but did re-deliver it "within a reasonable time." *Held*, that the condition was binding on the plaintiff, and he was not entitled to the return of the deposit.

A BYCICLE A "CARRIAGE." —*Taylor v. Goodman.* English High Court, Q. B. Div. 27 W. R. 489. By the Highway Act, 1835 (5 & 6 Will. 4 c. 50), sec. 78, "If any person, driving any sort of carriage, shall drive the same furiously so as to endanger the life or limb of any passenger, every person so offending," is liable to conviction. The appellant rode a bicycle furiously and injured a passenger, and was convicted before justices. *Held*, that he was "driving a carriage," within the meaning of the section, and was properly convicted.

LEASE — COVENANT NOT TO CARRY ON "BUSINESS" NOR PERMIT ANY ANNOYANCE— HOSPITAL. —*Bramwell v. Lacey.* English High Court, Chy. Div 27 W. R. 463. The lease of a house in a residential neighborhood contained a covenant not to carry on any "trade, business, or dealing whatsoever," or anything in the nature thereof on the demised premises, or to suffer any act or thing which might be or might grow to the annoyance, damage, injury, prejudice or inconvenience of the neighboring premises. *Held*, that each branch of the covenant was broken by the use of the premises as a hospital for out-patients suffering from diseases of the throat and chest, not carried on for any purposes of gain, and supported partly by payments made by the patients, but chiefly by voluntary contributions.

CORPORATIONS—RIGHT TO USE THE NAME OF THE COMPANY AS PLAINTIFFS AGAINST THE VOTE OF A LARGE MAJORITY OF SHAREHOLDERS.—*Silber Light Co. v. Silber.* English High Court, Chy. Div. 27 W. R. 427. The name of a company should not be used as plaintiffs in an action by a shareholder when a very large majority of the shareholders have passed a resolution against its being so used. In such a case, the court will order the name of the company to be struck out as plaintiffs, and treat the shareholder who wishes to institute the action as having brought himself within the doctrine of Atwool v. Merriweather, L. R. 5 Eq. 464n., so as to entitle him to proceed in his own name. An action having been commenced by a shareholder in his own name and in that of the company as plaintiffs, the company afterwards went into voluntary liquidation, and the shareholders resolved, by a large majority, that the action should not be continued in the company's name. The court ordered the company's name to be struck out as plaintiffs, but gave leave to the plaintiff shareholder to add the company as defendants.

VENDOR, PURCHASER, AND SUB-PURCHASER—DELIVERY OF GOODS TO ORDER OF SUB-PURCHASER WHO AGREES TO PAY VENDOR DIRECT— RESUMPTION OF POSSESSION BY VENDOR — MEASURE OF DAMAGES.—*Johnson v. Lancashire, etc. R. Co.* English High Court, C. P. Div. 27 W. R. 459. Plaintiffs having agreed to supply W with 100 wagons, according to sample, at £21 10s. each, employed L & Co. to supply them with the wagons according to sample at £18 each. L & Co. thereupon contracted with the defendants, the Wigan Wagon Co., for the supply of 100 wagons, according to sample, at £17 each, and with the concurrence of L & Co. it was agreed that plaintiffs should be charged by the defendants, the Wigan Wagon Co., direct. Thirty-eight wagons were delivered by the defendants, the Wigan Wagon Co., to the defendants, the L. & Y. Railway Co., to the order of plaintiff. W rejected the wagons as not being according to sample. Plaintiffs thereupon wrote to L & Co. that the wagons were not according to sample, and that they would dispose of them at the best price obtainable and hold L & Co. responsible. L & Co. then wrote to the defendants, the Wigan Wagon Co., and rejected the wagons. Plaintiffs gave notice to the defendants, the L. & Y. Railway Co., not to deliver the wagons except to plaintiffs' order. The defendants, the L. & Y. Railway Co., refused to deliver the wagons to plaintiffs, but delivered to defendants, the Wigan Wagon Co., who also refused to deliver to plaintiffs. In an action by the plaintiffs against the defendants for conversion of the wagons: *Held* (1.) That both defendants were liable, the property and right to possession being in the plaintiffs. (2.) That the defendants were strangers to the plaintiffs, and the measure of damages was the full value of the wagons at the time of the conversion.

ABSTRACTS OF RECENT DECISIONS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

January-March, 1879.

EQUITY— PETITION FOR THE SALE OF REAL ESTATE.—Where real estate made chargeable by the will of a testator with the payment of debts and legacies, is, through the negligence of the original executor, allowed to be sold for the non-payment of taxes, an administrator with the will annexed, who is appointed upon the death of such executor, can not maintain a bill in equity to sell the estate free from the tax title, and to have the proceeds distributed in various directions (including the payment of all sums due the purchaser), under the authority of this court. The purchaser has a right to hold such estate until it is redeemed in one of the methods pointed out by the statute. Opinion by ENDICOTT, J.—*Dewey v. Donovan.*

GUARDIAN—CONTRACT—SUIT AGAINST WARD.—A guardian of minor children has no authority to make any contract for labor and materials for the repair of a dwelling-house owned by them which shall bind his wards, although such repairs may be necessary; and the wards do not become parties to such contracts after the death or discharge of the guardian. Thacher v. Dinsmore, 6 Mass. 301; Hicks v. Chapman, 10 Allen, 564; Simons v. Almy, 100 Mass. 240. Opinion by COLT, J.— *Wallis v. Bardwell.*

CONTRACT—INTEREST—CONFLICT OF LAWS.—The defendant, being a creditor of the N. E. Mining Co., a corporation established under the laws of this Commonwealth, and owning and operating a mine in the State of Colorado, in pursuance of an understanding with the plaintiff, who was also a creditor of said company, sued and obtained an execution against said company and levied upon its property in Colorado, and bought the same at the sheriff's sale for the amount of his execution. The plaintiff and defendant subsequently, at Taunton, in this Commonwealth, entered into two contracts which recited that the amount due the defendant by said company was "twenty-nine hundred dollars and interest from August 20, 1867," and it was therein agreed that the defendant should manage the property of said company, and should convey the same to the plaintiff whenever he realized the amount of his said demand, either from sales of ore or other materials previously belonging to said company, or from money paid him by the plaintiff, or from both of these sources. Upon a bill in equity to enforce said contracts, it was *held*, that the defendant was entitled to interest to the date of the decree upon said sum of twenty-nine hundred dollars, and upon payments and advances made by him in carrying on the mine in accordance with said contracts. Ayer v. Tilden, 15 Gray, 138; Gibbs v. Bryant, 1 Pick. 118; but that the rate of interest was to be governed by the law of this Commonwealth, as the implied promise of the plaintiff to pay was made and was to be performed here. Opinion by MORTON, J.—*French v. Borden.*

SUPREME COURT OF OHIO.

December Term, 1878.

[Filed April 29, 1879.]

DEED FROM HUSBAND TO WIFE — WHEN DEED TAKES EFFECT.—1. A deed for the conveyance of land executed by a husband to his wife, without the intervention of a trustee, and intended as a suitable provision for her, though void at law, may be enforced in equity. 2. But such deed will not be enforced in equity to the prejudice of the rights of creditors or of children for whom no provision has been made. 3. Where a child complains against such provision for the wife, the burden of showing that no provision had been made in its favor rests upon the complainant. 4. When the grantor delivers his deed to a third person to be delivered by him to the grantee at the death of the grantor, without reserving to himself any control over the instrument, and such deed is delivered accordingly to the grantee, the title passes to the grantee upon such last delivery, and, by relation, the deed takes effect as of the date of the first delivery. Opinion by MCILVAINE, J. BOYNTON, J., dissenting. Judgment affirmed.—*Crooks v. Crooks.*

CRIMINAL PRACTICE—TRIAL — RIGHT TO LIMIT TIME FOR ARGUMENT.—1. The constitutional right of a person accused of felony "to appear and defend in person and with counsel," can not be denied or its exercise unreasonably abridged; but the court may limit the argument of the accused or his counsel, provided that the accused is not thereby deprived of a fair trial. 2. On the trial of one charged with a felony, eleven witnesses were examined, and the evidence, which occupied half a day in its delivery, was circumstantial and conflicting. The accused was defended by two counsel, who were limited, by the court, to thirty minutes in the argument to the jury: *Held*, that this was an abuse of power which prevented a fair trial. Judgment reversed and the cause remanded for a new trial. Opinion by GILMORE, C. J. WHITE and MCILVAINE, J.J., dissented, being of the opinion that the limitation of the argument did not, considering the case presented in the record, prevent a fair trial.—*Dille v. State.*

SUPREME COURT OF INDIANA.

November Term, 1878.

CONTRACTS OF MARRIED WOMEN—SEPARATE ESTATE.—The question in this case is whether the rents and profits of a married woman's separate estate can be subjected to the payment of her note, where, by the note itself, she agreed to pay it from her own separate property. The note was given for a period, and is as follows: "$200. Fowler, Ind., December 10, 1874. One year after date, I promise to pay to the order of E. D. Richards, out of my own separate property, two hundred dollars, etc. (Signed), Mary O'Brien." *Held*, that the contract could not be enforced against Mary O'Brien, nor be made a charge upon her separate estate. 60 Ind. 566, is directly in point. 59 Ind. 143. Affirmed. Opinion by PERKINS, J.—*Richards v. O'Brien.*

SHERIFF'S DEED—REFORMATION OF.— Complaint for the possession of land, setting out the title by a sheriff's deed on the foreclosure of a mortgage. *Held*, deeds of conveyance, as to the description of the premises conveyed, must be construed liberally, and in cases of this kind will be upheld whenever the description is sufficient to direct the sheriff in the execution of the writ for possession, without the exercise of any other than executive power, otherwise the deed must be held void for uncertainty. 29 Ind. 1; 34 Ind. 163; 40 Ind. 385; 41 Ind. 344. A sheriff's deed can not be reformed in the description of the premises, nor can the defect in the description be aided by extrinsic averments in the complaint. To do so would be to change the effect of the proceedings and decree upon which it is founded. A final judgment of a court can not be affected in this way. 37 Ind. 138; 42 Ind. 267; 47 Ind. 220. Affirmed. Opinion by BIDDLE, J.—*Lewis v. Owen.*

RULES OF COURT—HOW FAR BINDING.—This was a suit commenced before a justice of the peace and appealed to the circuit court where the appeal was dismissed, because the appeal bond was signed by the attorney for the defendant, and a rule of that court prohibited attorneys from signing such bonds. *Held*, that it was within the power of the court to make the rule in question, but as it was simply a rule of the circuit court and not the statute of the State, it would not necessarily be taken notice of as law by persons not members of the bar practising in that court. Hence, it would be unjust to such persons to punish them by a dismissal of their causes on account of the improper conduct of such attorneys, though the attorneys might have exposed themselves to punishment for contempt by the court, whose authority and rule they had knowingly disregarded. In cases where it is not by statute, but only by rule of court, that attorneys are prohibited from becoming surety, if attorneys violate such rule and become sureties, the bonds or obligations into which they enter are not void, but are binding on the obligors. 1 Chitty R. 713. The court erred in dismissing the appeal. Judgment reversed. Opinion by PERKINS, J.—*Ohio, etc. R. Co. v. Handy.*

DECEDENTS ESTATES—PAYMENT OF DEBTS COLLATERALLY SECURED. — Martha A. Alexander filed her claim against the estate of Thos. M. Alexander, consisting of three promissory notes executed by said

Thomas and Martha, each for $1,707.33, dated March 4, 1871, and due in one, two and three years. An answer was filed alleging that, at the time the notes were executed, the deceased transferred and assigned to plaintiff a judgment secured by mortgage on realty, as collateral security for the notes; that the personal estate of the deceased, after paying the widow and the debts, would not be sufficient to pay plaintiff's claim, and that if allowed real estate would have to be sold to pay it: that there is more than enough due on the judgment to pay the plaintiff's claim, and that the same can be collected. *Held*, that in equity the plaintiff ought to be required to proceed on the collateral and collect on her claim before asking an allowance of it against the estate, whereby real estate would have to be sold to pay it. If the administratrix were to sell realty to pay the claim and so pay it, the judgment would revert to her, or, perhaps, to the heir, whose land had been sold, and she would have in her hands personalty which should have been applied to the payment of the debt instead of the realty sold for that purpose. The plaintiff has the primary fund in her hands out of which her claim ought to be paid, and she ought to exhaust that fund before proceeding against the estate, whereby the secondary fund, the realty, would have to be sold. Judgment reversed. Opinion by WORDEN, J.—*Alexander v Alexander.*

SUPREME COURT OF PENNSYLVANIA.

January—March 1879.

PREMIUM ON PERPETUAL POLICY— DEBTOR AND CREDITOR—COLLATERAL SECURITY—MORTGAGEE.—A mortgagee to whom a perpetual policy of insurance has been assigned as collateral is entitled to the return premium upon a foreclosure of the mortgage and sale of the mortgaged premises for an amount insufficient to satisfy the debt. Opinion Per CURIAM.—*Rafsnyder's Appeal.*

WHAT IS A "VACANCY,'—1. When a new county is erected, a "vacancy" in its offices "happens," within the meaning of art. 4, sec. 8, of the constitution. 2. Where a new county was proclaimed on August 21, 1878, and the next general election occurred on November 5, 1878: *Held*, that no election for officers of the new county could be held until the second general election succeeding its erection, and that the governor's appointees were entitled to hold over until the term of those who should be chosen at such election. Opinion by WOODWARD, J. MERCUR and GORDON, JJ., dissenting.— *Walsh v. Com.* 7 W. N. 21.

STATUTE OF FRAUDS—INTEREST IN LAND—PAROL CONTRACT FOR SALE AND ABANDONMENT OF BUILDING ERECTED BY PERMISSION FOR SPECIAL PURPOSES UPON LAND OF ANOTHER.—A school district had the privilege of occupying for school purposes certain ground belonging to M, who verbally agreed to pay, and the school board agreed to receive, a specified sum for the school house which for twenty-five years had stood upon his land, upon condition that the school board would not condemn his ground for the erection of a new school house, but would abandon his land and build elsewhere. In an action by the school district to recover from M the amount he agreed to pay; *Held*, that the contract was not within the statute of frauds; that the sale of the house to M was a deliberate indication of an intent to abandon the property for school purposes; that it was not the deed of the school district that was necessary to execute the contract but its act of abandonment, and upon abandonment the property immediately reverted to the owner of the fee, and the matter became absolute, conclusive and irrevocable; that therefore the school district was entitled to recover. Opinion by GORDON, J.—*School District v. Milligan.* 7 W. N. 42.

NEGLIGENCE— APPLICATION OF THE RULE AS TO EMPLOYEES TO THE CASE OF A CONSIGNEE OF GOODS—STATUTE.—A Pennsylvania statute provides when any person shall sustain personal injury or loss of life while lawfully engaged or employed on or about the road, works, depots, and premises of a railroad company, or in and about any train or car therein or thereon, of which company such person is not an em-employee, the right of action and recovery in all such cases against the company shall be such only as would exist if such person were an employee. Provided, that this section shall not apply to passengers. *Held*, that a consignee of goods in charge of a railroad company, by going upon the tracks and about the cars of the company, under the direction of its servants, for the purpose of receiving and taking away the goods consigned to him, subjects himself to the operation of the act, and has no greater right of action against the company for injuries while thus employed than if he were a regular employee of the company. Opinion by GORDON, J. MERCUR, WOODWARD and TRUNKEY, JJ., dissent.—*Rickard v. Penn. R. Co.* 7 W. N. 37.

SUPREME COURT OF MISSOURI.

October Term, 1878.

[Filed March 25, 1879]

CRIMINAL PROCEDURE — CONTINUANCE IMPROPERLY REFUSED — REQUISITES OF AFFIDAVIT FOR FIRST APPLICATION—CREDIBILITY OF DEFENDANT AS WITNESS FOR HIMSELF A MATTER FOR THE JURY.—At the December Term, 1878, of the Cole circuit court, defendant was indicted for the murder of one Charles Brown. On the 3d of December he filed an application for continuance, which was overruled, and the case was set for trial on the 2d day of January, 1879, at same term, on which day defendant again applied for a continuance, which the court refused, and defendant was put on his trial, which resulted in a conviction of murder in the first degree. From that judgment he appealed. In the last application for a continuance defendant set forth the names of the absent witnesses, what he expected to prove by them, and the means used to secure their attendance. *Held*, that the application for continuance was improperly overruled. It was his "first application" within the meaning of the statute, his former application being refused, and the cause continued not to another term, but to another day in the same term. An application which is refused is not to be counted as an application under secs. 6 and 8 of Wag. Stat. pp. 1039 and 1040. Neither should defendant have been required to disclose the names of his absent witnesses, or what he expected to prove by them. The meaning of the two sections, *supra*, obviously is, that if a party has once on his application had a continuance from one term to another term, and again applies for a continuance, he shall give name of witnesses and what he expected to prove by them. There is nothing in the act requiring defendant to swear in his affidavit to the truth of what his absent witnesses would swear to. 2. On the trial the court gave an instruction that while defendant by law is a competent witness in his own behalf, the fact that he is testifying in his own behalf might be considered by the jury in determining the credibility of his testimony. *Held*, that the instruction simply declares the law, gives to the jury no information, is in conformity to the statute, and there was no impropriety in giving

it. Reversed and remanded. Opinion by HENRY, J. —*State v. Maguire.*

April Term, 1879.

[Filed May 10, 1879.]

INJUNCTION — SCHOOL PROPERTY NOT SUBJECT TO EXECUTION FOR DEBT — EQUITY WILL ENJOIN SALE THEREUNDER— MANDAMUS PROPER REMEDY FOR COLLECTION OF SUCH INDEBTEDNESS.—Bill in equity by Board of Education of Cape Girardeau to restrain sale under execution of school buildings on a judgment rendered against the Board of Education of the city of Cape Girardeau. On the hearing, the court perpetually enjoined the sale of the property levied on, and defendant, in injunction proceedings, brings his writ of error. *Held*, 1. That the beneficial plaintiff in this action is a public corporation (Gen. Stats 275, sec. 6, sess. acts of 1867, 160, sec. 6; Dillon Munc. Corp. sec. 10; Heller v. Stemmel, 52 Mo.) and therefore not subject to process of execution, at least so far as any school buildings or property are concerned (1 Wag. Stat. 295, sec. 36); and this finds further support in the avowed public policy of this State, to favor popular education. It would greatly tend to frustrate this design were school property subject to sale under the hammer, as attempted in this instance. It has been expressly decided by this court, that a school house and lot, title whereof is vested in a board of education, is not the subject of a mechanic's lien. Abercrombie v. Ely, 60 Mo. 23. If not subject to the lien, then not subject to sale to enforce such lien. 2. As the board is authorized to levy taxes, the appropriate method of procedure in such cases would be by *mandamus* to compel the levy of a sufficient tax to pay the indebtedness. Dillon Munc. Corp. sec. 446. Such a course would certainly avoid all difficulty, and oftentimes prevent the sacrifice of valuable public property. 3. The fact that beneficial plaintiff had an adequate remedy at law does not oust equitable jurisdiction in a case of this sort; for if it be the case that school houses are not vendible under execution, equity will interfere to prevent a cloud from being cast on the title by reason of a void sale, and also to prevent a multiplicity of suits springing from such void acts. Holland v. Mayor, 11 Md. 186; Vogler v. Montgomery, 54 Mo. 577; Danschroeder v. Thias, 57 Mo. 100; McPike v. Pen, 57 Mo. 63. Judgment affirmed. Opinion by SHERWOOD, C. J.—*State v. Tiedmann.*

MUNICIPAL CORPORATION CANNOT TAX LANDS BEYOND CORPORATE LIMITS, FOR LOCAL PURPOSES. —This was a suit to use of Town of Cameron to collect delinquent taxes for local purposes, levied on lands beyond the town limits, situate in an unincorporated portion of the town. Judgment for plaintiff, from which defendant appeals. *Held*, 1. It is settled in this State that the legislature cannot authorize a municipal corporation to tax for its own local purposes lands lying beyond the corporate limits. Wells v. Weston, 22 Mo. 384; St. Charles v. Nolle, 51 Mo. 122. 2. If the legislature could not confer such authority, then, *a fortiori*, the mere assumption of such authority by the officials of the *incorporated territory* could confer on their extra-territorial acts no validity. Section 8 of the act respecting town plats (Gen. Stat. 248), does not validate such acts. The only effect of that section is to vest in the town the fee of such lands as are designed for public use, and it has not the effect of *incorporating* an addition to such town, and making it part and parcel of the original incorporation. This construction has been adopted by the legislature, for in 1871 an act was passed making special provision, whereby the inhabitants of any addition to any incorporated town not included within the metes and bounds of such incorporation, might become a part thereof. 2 Wag. Stat. 1314, §1. 3. The inhabitants of the unincorporated portion of the town are not estopped from resisting collection of the tax in question, by reason of payment of such illegal taxes, theretofore levied on their property in that locality. "The duty to speak ought to be very imperative to make mere silence operative as an estoppel." Cooley on Taxation, 573 *et seq.* Reversed and remanded. Opinion by SHERWOOD, C. J. *State v. Stephenson.*

SUPREME COURT OF ILLINOIS.

[Filed at Ottawa, January 25, 1879.]

NEGLIGENCE — DEFECTIVE SIDEWALK — NOTICE OF DEFECT NEED NOT BE ACTUAL, WHERE DEFECT IS LONG CONTINUED.—This was a suit brought against the city of Aurora to recover for personal injuries which plaintiff received in consequence of a defective sidewalk over which she was passing. At the place where the accident occurred a board was missing, which was not observed by her until she stepped in the hole, by which the injury was caused. It is objected on the part of the city that it had no notice of the defect in the sidewalk. SCOTT, J., says: "Whether the city authorities had any actual notice of the dangerous condition of the sidewalk at that particular place is not definitely proved, but it is proved it had been out of repair so long, they might by the exercise of reasonable diligence have known its condition. The law is that when a sidewalk has been properly constructed, with reference to the safety of persons using it, and through long use or natural decay has become unsafe, before a party can recover for injuries sustained in consequence thereof it must be made to appear the corporate authorities knew or could have known by the exercise of reasonable diligence its unsafe condition, and sufficient time must have elapsed after notice, in which to make repairs." Affirmed.— *City of Aurora v. Dale.*

PRACTICE — ARBITRATION AND AWARD — REPORT OF REFEREE MUST BE IN WRITING.— This suit was commenced by appellee against appellant before a justice of the peace, where, on trial, judgment was rendered for appellant. Appellee appealed to the circuit court. By a stipulation made and filed, the cause while pending in the circuit court, was referred to an arbitrator. The arbitrator heard the evidence and made a report, merely stating the conclusions of law and fact arrived at, and stating that "by consent of both parties the testimony herein was not reported in writing." Judgment was entered for appellee in accordance with the report. Appellant now objects on the ground that under the statute providing for "arbitration and award" the testimony must be reported to the court in writing. SCHOLFIELD, J., says: "The proceeding before a referee being statutory, must in all substantial respects pursue the statute or it cannot be sustained. The statute we have quoted provides for the selection or appointment of no referee except by order of court. It authorizes no report by a referee except one containing the evidence heard and giving the referee's conclusions thereon, to which the parties are entitled to be heard on exceptions. It is impossible, therefore, that this reference can be sustained as a compliance with the statute. This is well illustrated by reference to kindred cases, where causes pending are submitted to arbitration with an agreement that judgment may be rendered thereon under the statute. In such cases it is held nothing but a strictly substantial compliance with the statute will authorize the court to enter a judgment upon the award. See 15 Ill. 368; 17 Ill. 111." Reversed and remanded.— *Morey v. Warrior Mower Co.*

NEGLIGENCE — EMPLOYER AND EMPLOYEE — NECESSITY OF PROOF OF DUE CARE ON THE PART OF

EMPLOYEE.—On the 25th of November, 1873, L. an employee of the Penn, Co., whilst engaged with a co-employee in transferring a bale of wool from one freight car to another, was thrown upon the ground, in consequence of the breaking of the temporary platform connecting the cars which they were using to effect the transfer. This is an action by L. against the company to recover damages. Plaintiff recovered below. SCHOLFIELD, J., says: "The ruling of the court below in giving and refusing instructions, in effect ignores an indispensable element in appellee's right to recover—the observance of due care and caution on his part to have avoided the injury of which he complains. While there is an implied contract between employer and employee that the former shall procure and keep suitable tools, etc., with which to perform the labors required of the latter, and also that the latter shall be advised by the former of all the damages incident to the service of which the latter is not cognizant, yet the failure of the employer in this regard furnishes no excuse for the conduct of an employee, who voluntarily incurs a known damage. He must himself use due care and caution to avoid injury. See Priestly v. Fowler, 3 M. & W. 1; 2 H. & N. 768; 63 N. Y. 453; 49 N. Y. 534 and 71 Ill. 417. There is nothing in Chicago &c. R. Co. v. Shannon, 43 Ill. 339; Chicago, &c. R. Co. v. Swett, 45 Id. 197, and Illinois, &c. R. Co. v. Phillips, 49 Id. 234; Toledo, &c. R. Co. v. Fredericks, 71 Id. 294; Toledo, &c. R. Co. v. Ingraham, 77 Id. 309, in conflict with this rule. In those cases the employee had not the necessary facilities for obtaining a knowledge of the peril to which he was exposed, to have enabled him to avoid it, and he was chargeable with no want of due care." Reversed.—*Penn. R. Co. v. Lynch.*

BOOK NOTICES.

[NEW BOOKS RECEIVED—Leading Cases on the Public Land Laws; J. Vance Lewis, Washington, D. C. Bradwell's Reports, vol. 2; The Legal News Co., Chicago. Mills on Eminent Domain; F. H. Thomas & Co., St. Louis.]

REPORTS OF THE DECISIONS OF THE APPELLATE Courts of the State of Illinois. By JAMES B. BRADWELL. Chicago: The Legal News Co. 1879.

The Illinois bar is to be congratulated upon the promptness with which the reporter of the appellate courts is able to present the decisions of these tribunals. The present volume contains all the remaining opinions of the first district to the March term, 1879: of the second district to the June term, 1878, and of the third district to the November term, 1878. The opinions in every case reverse the judgment below, the act creating the appellate courts requiring the judges to write their opinion only in reversals. The volume contains 700 pages, and the opinions are shorter than usual. The *syllabi* have been carefully prepared, but the lack of a table of cases cited is noticeable. Among the decisions of general interest we note the following:

Where goods are fraudulently obtained on credit, the seller may rescind the contract of sale *in toto*, and bring trover or replevin for the goods before the time of credit has expired. But to sue for the price of the goods sold is a waiver of the tort, and an affirmance of the sale, and if brought before the expiration of the time of credit, the action is premature: *Kellogg v. Turpie.* Moneys collected by a collecting agent, and not paid over, do not constitute a trust fund such as to prevent the running of the statute of limitations: *Cagwin v. Ball.* A person is not required to use "especial care" in order to guard against the willful neglect of others: *Chicago, etc., R. Co. v. Clark.* A divorce may be granted on a cross bill filed by a non-resident defendant: *Sterl v. Sterl.* In an action for breach of promise of marriage, the bad character of the plaintiff may be shown in mitigation of damages: *Kantzler v. Grant.* In an action on a judgment of a foreign court of limited jurisdiction, its jurisdiction in the case must be averred: *Spooner v. Warner.* An assessment of an entire tract of land owned by different persons is void. *Lyman v. People.* The sureties on the bond of a city treasurer for his second term are estopped from denying the truth of his official report as to the amount of money in his hands at the end of his first term: *Gage v. City of Chicago.* Sureties of a city treasurer signed a printed form of a bond with blanks for inserting in the body the names of the sureties, amount of the penalty, the office to which the principal had been elected, etc. These blanks were afterwards filled up by the city officers, without the knowledge or consent of the sureties. *Held*, that the sureties were not bound: *Id.* A statute requiring a city treasurer to take the oath of office and file his bond within fifteen days after his election is mandatory, and a failure to file such bond within the required time is a vacation of such office, and relieves the sureties from liability on the bond: *Id.* A condition in a lease that the lessee will pay all "assessments," does not include taxes: *Stephani v. Bishop of Chicago.* A bequest to trustees for such charitable purposes as they shall designate, is invalid: *Taylor v. Keep.* Municipal corporations, in the absence of statute, have no power to engage in commerce, or to make subscriptions or donations to railroads. *Town of Pana v. Lippincott.* A sheriff, and at the same time *ex officio* tax collector is not personally liable for the payment of printers' bills for publishing delinquent tax lists: *Broadwell v. Chapin.* In *President, etc., v. Carter*, the court say of the Illinois doctrine of comparative negligence: "The doctrine of comparative negligence has, in some way, crept into the practice in a manner so inaccurately understood, as to have led to many erroneous notions relating to it. It never was the law in this State that the negligence of the parties to a controversy upon that subject could be weighed in a scale where, if it inclined at all in favor of the plaintiff, he might recover against the defendant. Nor is it believed has such a rule ever been established by a court of recognized authority that if the negligence of a plaintiff in a case of this kind is a shade less than that of the defendant, he may be allowed to recover."

QUERIES AND ANSWERS.

[The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.],

**** *The following queries received during the past week are respectfully submitted to our subscribers for solution, by request of the senders. It is particularly desired that any of our readers who have had similar cases, or have investigated the principles on which they depend, will take the trouble to forward an answer to as many of them as they are able.*

QUERIES.

26. INDICTMENT—SUFFICIENCY OF.—A subscriber at Maysville, Mo., submits the following indictment, and asks the opinion of correspondents as to its sufficiency. It was held bad by the circuit court. The objection to it was that instead of the words "feloniously assaulted and wounded," the words "feloniously assaulted and feloniously wounded" should have been used; that the allegation as made did not charge a fel-

onious wounding. The precedent is found in Kelley's Crim. Law, p. 286. "State of Missouri, County of De Kalb. In the De Kalb County Circuit Court, April Term, A. D. 1879: The grand jurors for the State of Missouri empaneled, sworn and charged to inquire within and for the body of the county of De Kalb and State aforesaid, upon their oaths present and charge that George Leonard, late of said county, on the 18th day of March, 1879, at De Kalb county aforesaid, feloniously assaulted and wounded John W. McElwain with a heavy whip stock, a deadly weapon likely to produce great bodily harm and death; and that him, the said John W, McElwain, did then and there strike, beat, wound and ill treat with great force, which was likely to produce death, against the peace and dignity of the State. A true bill."

ANSWERS.

No. 18.

[8 Cent. L. J. 307.]

In construing a will the intention of the testator, when ascertained, always governs—provided always that his intention violates no law. In construing a will, or a contract, all parts of the instrument must be taken together. John Gray, by the will of his father, expressed in the first clause, gets two-fifths of the entire estate; and if there were no further condition or limitation in the will, would take it absolutely without restraint as to its use or disposal. But by the subsequent clause there is a clear, definite and unmistakable direction that the two-fifths shall be invested in productive real estate in the name of the children. Undoubtedly, then, the *fee simple* of that real estate, when the investment has been made, will be in those children. There is in the will no word indicating an intention to give them less than an absolute, unlimited and unrestricted estate in the 2-5, and a beneficial estate in the parent with the legal estate in the children, can not arise by inference. If it could, then would the parent take a life estate with remainder to the children? I infer, therefore, that the father under the will is merely a trustee for the investment of the estate for his children. I can not think that the direction in the latter clause of the will is inconsistent with the absosolute devise contained in the first clause. This fact must also be borne in mind: the property devised was not real estate. Suppose, instead of an absolute bequest in the first clause, with a direction as to what should be done with the property devised in a subsequent clause, the devise and the direction as to its disposition had been expressed in one clause: "I bequeath to my son John Gray, 2-5 of the following estate, and direct that the same be invested in productive real estate, and the title thereto taken in the name of his children." Could it be said that John Gray would take the 2-5 absolutely, because of the repugnancy of the directing clause or sentence to that which expressed the bequest? W. H.

NOTES.

THREE HUNDRED AND SEVENTY-NINE CASES were disposed of in the United States Supreme Court during the term just ended. The number of cases on the docket, including those considered this term, has increased to 1,150. The court is now more than three years behind in its business. New York State heads the list on the docket with 146 cases. Every State and Territory in the Union, except Delaware, is represented by at least one case. Twenty-four cities, counties and towns sought to evade the payment of their bonds. In twenty-three of these the court held the bonds must be paid. All but four of the bond cases came from Illinois, Missouri, Kansas, Arkansas, Iowa and Louisiana. The comparison of work this term with that of last shows a decrease of thirty-two in the number of cases finally cleared from the docket. The court is now seventy-two cases farther behind than at the close of the October term, 1877.——A plan adopted by the English publisher of the Encyclopædia Britannica to overcome the lack of an international copyright law is described by a New York paper: On the verso of the title of the ninth volume of the ninth edition of the Encyclopædia Britannica, is the following notice: "The copyright in the United States of the articles Fire, Florida, Benjamin Franklin and Fur is the property of Little, Brown & Co., Boston." This reduces the American firm, who have undertaken to supply the American public with a reprint of this encyclopædia, to a choice between two alternatives. They must abandon their scheme, leaving purchasers with an incomplete set on their hands, or they may continue it on condition of supplying an imperfect book. Any American reprint of this ninth volume must omit the important articles above mentioned.

The novel system of recording deeds, invented by Mr. Dillon, an officer of the Irish Registration of Deeds Department, consists, firstly, in copying all deeds by photography, and preserving the copies in miniature. These copies are, by a special process of photographic chemistry, converted into thin metallic sheets on which the letters are indented, and from which enlarged copies can be made whenever required. The second step is the system of indexing, and this is divided into a mechanical index of names of persons and names of places, and a book index similarly arranged. Both these indices are compiled in legible type characters produced from stereotype plates, and arranged in alphabetical order. The mechanical index consists of a framing or case about five feet high and three feet wide, and the same depth from front to back. There is a small handle on either side, one of which (that on the left side) rotates the index of names, while that on the right rotates the list of places. Both lists are embossed in type characters on what Mr. Dillon calls brass paper, which is thin sheet brass coated with paper, and which is wound from an upper on to a lower roller, or *vice versa*, as may be necessary. The indices are read from the front of the apparatus through a plate of glass, which prevents their being touched, and they are otherwise securely enclosed. The handles can be rotated at high speeds in searching, as it is not necessary for the eye to follow the travel of the index, there being a couple of indicators moving at slow speeds along two horizontal scales on a level with the eye of the operator. One of these scales is marked with the letters of the alphabet for the index of names, while the other is marked with names of counties. When the pointer stops over the required initial in one case, or the name of the required county in the other, the operator ceases turning the handle and looks at the index, where he finds the object of his search exposed to view. The metallic roll being embossed in type characters on metal, is not only comparatively indestructible, but affords a means whereby any number of printed copies may be taken from the records. The third part of Mr. Dillon's system consists in a simple arrangement for compiling indices in bound books in printed characters. This is an alternative plan of recording, which has deen devised by Mr. Dillon to meet the case where it is desirable to have books instead of the mechanical index. The book is opened at the required page, placed under a frame fitted with elastic hinges, and the entries are made from a stereotype block which is inked and impressed by a screw arrangement at any desired place on the page.